

LW2903 Business and Law

Termination

Lecture 10

Termination of an Employment Contract

- It may be terminated by the employer or employee.
- A contract may be terminated by Notice or Payment in lieu of Notice. ^{instead of} ^{only}
- During the first month of probation – no notice is required.
- After the first month of probation – not less than 7 days notice is required.
- If there is no probation or after the probation period:
 - either in accordance with the agreement which should not be less than 7 days; ^{按BB} or longer (stated in contract)
 - or without agreement which should not be less than 1 month. ^{not written down}

Annual leave and notice Period

Employment Ordinance → = employer X force employee to offset by annual leave

- Section 6(2A) EO – annual leave cannot be included in the notice period required to terminate an employment contract.
- However, in *Kao, Lee and Yip v Lau Wing and Tsui Wai Yu* (2008) The Court of Final Appeal held that an employee have a right to use accrued annual leave too offset the notice period.
- The court held that s.6(2) was meant to protect the employee and would therefore not apply to cases where the employee decides to use annual leave to offset the notice period.
- An employee who exercises his right to use annual leave to offset the notice period and brings forward his last day of work, will only be paid until this last day of work. Whereas, an employee who uses his annual leave during the notice period does not bring forward the last day of work, and the employer will pay the salary for the full notice period. Any unused annual leave can be en-cashed by the employee.

if last day X change → paid as usual

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
25	26	27	28	29	30	1 <i>Resign</i>
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31 <i>last day</i>	1	2	3	4	5

Holidays and Observances: 10: Columbus Day, 31: Halloween

how many days will get paid:
 ↳ 14

★ Annual leave offset ^{notice period} = payment to terminate contract
 (∵ can leave earlier)

SUNDAY	MONDAY	TUESDAY	WEDNESDAY	THURSDAY	FRIDAY	SATURDAY
25	26	27	28	29	30	1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29
30	31	1	2	3	4	5

→ worked
 → Annual leave
 → worked
 → worked

how many days will get paid:
 ↳ 31

★ whether last day of work is brought forward
 This case annual leave is only used for holiday

Termination without Notice or Wages in lieu of Notice – **by an employer**

- An employer may ^{dismissal} summarily dismiss an employee without notice or payment in lieu of notice if the employee, in relation to his employment:
 1. wilfully disobeys a lawful and reasonable order; ^{when is work-related & reasonable} include OT, extra work
 2. misconducts himself;
 3. is guilty of fraud or dishonesty; or ^{criminal liabilities}
 4. is habitually neglectful in his duties.

Tadjudin Sunny v Bank of America, National Association [2014]

- An action for breach of contract of employment. Plaintiff was employed as an analyst at the level of vice president. Her contract of employment provided that one month notice in writing or by paying one month's salary in lieu of notice. The plaintiff was eligible to be considered for bonus as well. In 2007, the defendant terminated the plaintiff's employment by giving her one month's salary in lieu of notice **without bonus**.
- It was held that the bank **cannot** exercise its right to terminate her employment contract by giving payment in lieu of notice to avoid paying bonus to the plaintiff.

Termination without Notice or Wages in lieu of Notice – **by an employee**

- An employee may terminate his employment contract without notice or payment in lieu of notice if:
 1. he **reasonably** fears physical danger by violence or disease;
 2. he is subjected to ill-treatment by the employer; or
 3. he has been employed for not less than five years and is certified by registered medical practitioner or a registered Chinese medicine practitioner as being **permanently unfit for the type of work he is being engaged** (see Chapter 10) – *A Concise Guide to Employment Ordinance* p.44 (Uploaded on Canvas)

eg.
mental
disease

Unreasonable dismissal

- Same employer
- 4 weeks
- 18 hours of work

- An employee employed under a continuous contract or a period of **not less than 24 months** may make a claim for remedies against an employer for **unreasonable dismissal** if he is dismissed **other than for a valid reason as specified in the Employment Ordinance**.
- Under the Employment Ordinance, **the five valid reasons** for dismissal or variation of the terms of the employment contract are:
 1. the conduct of the employee;
 2. the capability or qualifications of the employee for performing his work; *eg. lie about ability*
 3. redundancy or other genuine operational requirements of the business; *eg. close branch*
 4. ^{= legal} statutory requirements; or *(eg. if legal → illegal to employ you)*
 5. other substantial reasons.
bad to employee

∴ misconduct (plagiarization) → ≠ true reason (whether/not to dismiss employee)

Thomas Vincent v South China Morning Post Publishers Limited

- After nearly 7 years of litigation (arguing over HK\$92,000) the Court of Final Appeal sets out the correct approach to be adopted to determine whether “valid reasons” had been given.
- The correct approach to be adopted is:
 - the conduct cited by the employer for the termination must be the ^(legitimately) true reason. If in reality there was some other reason why the employee was dismissed then the reason given would not be a “valid reason”,
 - the specified conduct must be *relevant* to the question of whether or not to dismiss the employee, and
 - the conduct must not be ^{minor} trifling. _{輕微}

correct approach:

if employee knows (warning) what he is wrong &

give him time to adjust

eg. always always late for work

plagiarize ≠ incompetent / fail to perform

took article from Sunday Times (just first time!)

Unreasonable and Unlawful dismissal



- An employee may make a claim for remedies against an employer for unreasonable and unlawful dismissal if –
 - the employee is dismissed by the employer other than for a valid reason as specified in the Employment Ordinance AND
 - the dismissal is in contravention of the law (listed on the next slide)

Statutory restriction on Termination of Employment Contract

An employer shall not dismiss an employee when: (by law)

- a female employee has been confirmed **pregnant** and has served a notice of pregnancy;
- an employee is on **paid sick leave**;
- an employee by reason of his giving of evidence or information in any proceedings or inquiry in connection with the **enforcement of the Employment Ordinance, work accidents or breach of work safety legislation**;
protected when pointing finger to boss
E'ee ^{she} evidence → E'er (defendant)
- an employee participate in **trade union** membership and activities (See Campbell Richard Blakeney – William and Others v Cathay Pacific Airlines Ltd and Another [2010])
- an employee was **injured** and having entered into agreement with the employer for employee's compensation or before the issue of a certificate of assessment.

E'ee v E'er (defendant)
After compensation → X dismiss
E'ee

Termination Payments

- The items and amount of payments payable to an employee on termination of employment or expiry of the contract depend on a number of factors such as the length of service, the terms of employment contract and the reason for termination of contract. Termination payments usually include

final payment got from boss

- outstanding wages;
- wages in lieu of notice, if any;
- payment in lieu of any untaken annual leave, and any pro rata annual leave pay for the current leave year;
- any outstanding sum of end of year payment, and pro rata end of year payment for the current payment period;
- where appropriate, long service payment or severance payment;
- other payments under the employment contract, such as, gratuity, provident fund, etc.

公積金

Claim for unreasonable dismissal

- Under such circumstances, the Labour Tribunal, in considering the case, may order –
 1. reinstatement or re-engagement of the dismissed employee (subject to the **mutual consent** of both the employer and employee); or *= get back your old job* *quite rare*
 2. an award of terminal payments against the employer. *get payment & quit*

Claim for unreasonable and unlawful dismissal

- Under such circumstances, the Labour Tribunal, in considering the case, may order –
 1. reinstatement or re-engagement of the dismissed employee (subject to the mutual consent of both the employer and employee); or
 2. an award of terminal payments against the employer. Furthermore, the Labour Tribunal may order an award of compensation not exceeding HK\$150,000 to the employee in appropriate cases.

like penalty to compensate employee